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No. 95-1773

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF TEXAS, *et al.*,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners seek review by this Court of six "questions" raising the following issues:

1. Whether, as both courts below found and as petitioners have repeatedly conceded, the admissions process used in 1992 by the University of Texas at Austin Law School impermissibly discriminated on the basis of race and thus violated the Constitution.

2. Whether petitioners may use race to grant preferences in law school admissions to members of two select racial groups in order to remedy generalized societal discrimination or discrimination by state actors other than the law school.

3. Whether petitioners may rely on this Court's decision in *United States v. Fordice* as a mandate to adopt new, racially discriminatory admissions procedures unconnected to any policies from the *de jure* era.

4. Whether the provision in Title VI of the Civil Rights Act of 1964, as amended, which provides that those States that choose to receive federal funds have waived their Eleventh Amendment immunity, is unconstitutional under this Court's decision in *Seminole Tribe of Florida v. Florida.*

5. Whether the approach to burden-shifting used by this Court in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* and a variety of other cases, including racial discrimination cases, applies to this case.

6. Whether a court decision that clarifies the law, and thus has some prospective impact on the conduct of those who wish to conform their conduct to the law, violates the "case" or "controversy" requirement of Article III.

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BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

Respondents Cheryl J. Hopwood and Douglas W. Carvell (hereafter "respondents") respectfully submit this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The Court of Appeals for the Fifth Circuit held that petitioners' law school admissions program, which used racial preferences and race-based decisionmaking in order to achieve pre-determined racial and ethnic ratios in the student body, violated the Equal Protection Clause of the Fourteenth Amendment. Petitioners, who have announced to the public that they will cease to discriminate and will no longer permit race to play a determinative role in admissions, have simultaneously sought review by this Court to challenge the correctness of the lower court's decision prohibiting the racial practices petitioners assert they have abandoned.

Petitioners acknowledge that the "central question before this Court" is the constitutional limit on the use of race in law school admissions. Pet. 1. Petitioners, however, wish to be on all sides of that "central question," and this case is therefore not an appropriate one for certiorari review.

All agree that petitioners' 1992 admissions process was predicated upon unconstitutional racial discrimination: the district court so held, and petitioners did not appeal from that holding; all three circuit judges reached the same conclusion; and the Attorney General for petitioner State of Texas has recently announced that that program was unconstitutional. (The Attorney General's press release and accompanying statement have been lodged with the Court.)

Respondents agree with petitioners' public announcement that "[a]dmissions decisions should not be based upon race or ethnicity," that race "should play no determinative role" in the admissions process, and that "past discrimination [will never be overcome] by practicing discrimination today." Those statements are fully consistent with the court of appeals' decision, which requires that "the law school may not use race as a factor in law school admissions." Pet. App. A3. Petitioners' public avowal that "the Law School has altered its admissions policy to conform with these principles" and their recent, albeit belated, recognition that these principles are mandated by the Constitution, suggest that petitioners intend to *comply* with the court of appeals' decision, regardless of how the Court acts on their certiorari petition.

In their petition to this Court, however, petitioners take a position squarely in conflict with their public pronouncements. In the petition, petitioners have not disavowed reliance on race, or even reliance on "diversity" as a justification for using race in admissions decisions; nor have they abandoned the use of arbitrary percentages as targets for racial and ethnic ratios in the law school. Pet. 29.

Petitioners are thus in the untenable position of asking this Court for an advisory opinion concerning an admissions program that is not the subject of this litigation, is nowhere set forth in the record, was not considered by either of the courts below, and which -- if petitioners' latest public pronouncements are truthful -- they do not intend to implement.

This case undeniably involves important issues, but it is equally undeniable that, given the state of the record and petitioners' public statements, it is not the appropriate vehicle for the Court to address those issues. In light of petitioners' refusal to articulate forthrightly and consistently the policies they choose to defend before this Court, the Court should deny the petition and allow the courts below to implement the court of appeals' decision.

STATEMENT

The petition misdescribes the record, misstates many important findings of fact, and attempts to mislead the Court as to the nature of the case. Consequently, respondents set forth below the relevant facts.

A. The Law School's Admissions Process

The law school, as petitioners recognize, is "the State's flagship institution," Pet. 1, "one of the nation's leading law schools" and "a bargain for the quality of education the law school's students receive." Pet. App. A4, B23. It is undisputed that in 1992 the law school "discriminate[d] in favor" of African American and Mexican American applicants by giving them "substantial racial preferences in its admissions program," and discriminated against all others "based upon the color of their skin." *Id.* A3, A12.

It is also undisputed that *de jure* discrimination *against* African Americans by the law school ended after *Sweatt v. Painter*, 339 U.S. 629 (1950), and that there was never *de jure* discrimination in education against Mexican Americans.

Pet. App. A43, A47-A48 n.50. Petitioners' practice of *favoring* African Americans and Mexican Americans in admissions has existed since at least the late 1960s. *Id.* A43. By 1992, the preferential admissions program had evolved into a system designed specifically to achieve a class consisting of at least 10% Mexican Americans and 5% African Americans, percentages "virtually indistinguishable from quotas." *Id.* A71 (Wiener, J., concurring). Those two groups, and only those two groups, were the beneficiaries of petitioners' race preferences, and members of those groups were given preferences even when they were from other states, or had attended private or out-of-state schools. *E.g.*, *id.* A6 n.4, A39, A71-A72; B18 n.22.[1]

In order to meet the predetermined racial proportions, admissions decisions were based largely on an applicant's "Texas Index" ("TI") number, a composite of undergraduate GPA and LSAT scores. The TI numbers were "paramount" in the admissions process and petitioners "relied heavily" on the TI in making admissions decisions. *Id.* A4.

The law school used TI scores to sort applicants into "presumptive admit," "presumptive deny," and "discretionary

[1] Petitioners repeatedly state that the 5% and 10% "targets" are "purely aspirational," *e.g.*, Pet. 5, 29, but they have been "especially adept" in hitting their "targets." Pet. App. A32 n.36. For the five most recent entering classes before the district court (1989 through 1993), the percentage of Mexican Americans ranged from 10.0 to 11.6 and the percentage of African Americans ranged from 5.9 to 8.0. *Id.* B49 n.67. Moreover, the circuit court found that the "targets" are not "purely aspirational": Judge Wiener described the targets as "virtually indistinguishable from quotas," and the majority opinion below emphasized that petitioners continually manipulated the presumptive admission and presumptive denial scores in order to achieve their predetermined racial targets. *E.g.*, *id.* A7 & n.6, A9 & n.10.

admit" categories. Most applicants in the "presumptive admit" category were admitted "with little review," while those in the "presumptive deny" category were also given little consideration before being rejected. *Id.* A5.

"Blacks and Mexican Americans were treated differently from other candidates . . . ." *Id.* A6. "First, compared to whites and non-preferred minorities, the TI ranges that were used to place [preferred minorities] into the three admissions categories were lowered to allow the law school to consider and admit more of them." *Id.* A6-A7. In 1992, the "presumptive admit" score for whites and non-preferred minorities was 199; their presumptive deny score was 192. For blacks and Mexican Americans, the presumptive admit score was 189; the presumptive deny score was 179. *Id.* A7; *see also* note 2, *infra.*

Thus, as the district court found, "the presumptive denial score for nonminorities was higher than the presumptive admission score for [the two preferred] minorities." *Id.* B21. Given the way petitioners chose to structure their admissions system, "[t]hese disparate standards greatly affected a candidate's chance of admission. . . . [B]ecause the presumptive *denial* score for whites [and the other non-preferred groups] was a TI of 192 or lower, and the presumptive *admit* TI for [the two preferred] minorities was 189 or higher, a minority candidate with a TI of 189 or above almost certainly would be *admitted*, even though his score was considerably below the level at which a white candidate almost certainly would be *rejected*. Out of the pool of resident applicants who fell within this range (189-192 inclusive), 100% of blacks and 90% of Mexican Americans, but only 6% of whites, were offered admission." *Id.* A8-A9 (emphases by the court) (footnote omitted).

Petitioners' admissions system contained a number of other race-based selection procedures. "In addition to maintaining separate presumptive [admit and deny] levels for minorities

and whites, the law school ran a segregated evaluation process" and "race was always an overt part of the review of any applicant's file." *Id.* A9-A10. Applications were color-coded according to race so that each applicant's race would be obvious to administrators, even at a glance. Admissions decisions were based solely on material included in the applicant's file, which made the contents of the race-coded file determinative. *Id.* B24. There was no individual comparison between minority and nonminority applicants. *Id.* B52. The law school kept racially segregated waiting lists. *Id.* A10.

For applicants with TI scores within the discretionary zone, candidates from the two preferred minority groups were reviewed differently from all others, receiving the benefit of a more searching and individualized consideration by a special, separate "minority subcommittee," the decisions of which were "virtually final." *Id.* A10.[2]

Both respondents Cheryl J. Hopwood ("Hopwood") and Douglas W. Carvell ("Carvell") were, at the time of suit, Texas residents who had applied for admission to the law school's 1992 entering class. Respondents' applications were reviewed through petitioners' race-based admissions process. Hopwood had a TI score of 199 (a "presumptive admit") and Carvell had a TI score of 197 (a "presumptive admit" score if he had been black or Mexican American, and at the high end of the "discretionary admit" for everyone not a member of the preferred groups). Neither respondent is an African American nor a Mexican American, and both were denied admission. *Id.* A10-A11. No African American or Mexican

[2] Indeed, the district court found that in 1992 the files of *all* African American or Mexican American applicants below the "presumptive admit" line -- even those in the "presumptive *denial*" category -- were reviewed in the same way by the special minority subcommittee. Pet. App. B15.

American state resident with a TI score of 193 or above was rejected by the law school during 1992. Trial Tr., Vol. 6 at 17-18.

B. The Proceedings Below

1. The District Court's Decision

Respondents sued under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, *et seq.* (1994)), and 42 U.S.C. §§ 1981 and 1983 (1994), alleging that petitioners administered a racially discriminatory admissions program in violation of their statutory rights and their rights under the Fourteenth Amendment to the Constitution.

Following a bench trial, the district court found that the petitioners had violated respondents' rights to equal protection of the laws. The district court concluded, however, that the constitutional violation was limited to petitioners' use of separate admissions committees. As the circuit court recognized, this "victory was pyrrhic at best," Pet. App. A11, because the district court refused to enjoin the law school from using race in admissions. The district court also denied prospective injunctive relief because the law school, on the eve of trial, announced the adoption of a single committee admissions system -- even though the single committee would use the same admission standards to produce the same racial proportions in the student body.[3]

[3] Like their announcement at the time of filing their petition, petitioners' eve-of-trial announcement offered little detailed information about the "new procedure." Indeed, petitioners have a practice of "announcing" policies that sound benign, while pursuing undisclosed policies that are manifestly invidious. The "new procedure" described at trial still contained the 10% and 5% "targets" for admissions of Mexican Americans and African Americans, and applicants' TI scores would still be compared only with others in their racial group. Trial Tr., Vol. 6 at 64-69. Petitioners gave no termination date for their "new procedure."

The district court refused to order that petitioners be admitted to the law school on the ground that they "had not met their burden of showing that they would have been admitted but for the unlawful system." *Id.* A13. The court denied compensatory and punitive damages except "a one-dollar nominal award to each plaintiff" and the "right" to re-apply to the law school without paying a new application fee. *Id.* A11.

2. The Court Of Appeals' Decision

The court of appeals reversed and remanded for further proceedings. Following this Court's precedents, the court held that "discrimination based upon race is highly suspect" and that racial classifications are therefore subject to strict judicial scrutiny. Pet. App. A14-A15. The court then proceeded to analyze petitioners' program within the strict scrutiny framework. First, the court concluded that petitioners' purported "diversity" goal "is not a compelling interest under the Fourteenth Amendment," *id.* A23, and thus does not provide a constitutional basis for engaging in racial discrimination. "Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals." *Id.* A26. In reaching that conclusion, the court of appeals was guided primarily by this Court's decisions in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), and *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995). The court concluded that "we see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. Were we to decide otherwise, we would

contravene precedent that we are not authorized to challenge." Pet. App. A27.[4]

The court then analyzed petitioners' "remedial" justification in light of this Court's guidance that remedying the present effects of past discrimination may be a compelling interest for purposes of the Fourteenth Amendment. *Id.* A35-A47. Based upon the absence of evidence that the law school had ever discriminated against Mexican Americans, and upon evidence that its discrimination against blacks had ended decades earlier, the court below found that petitioners' only justifications for their discriminatory admissions program were arguments based upon alleged *societal* discrimination, and alleged discrimination by state actors other than the law school itself. The court found that petitioners' purported remedial regime was "boundless" and gave rise to "an inference . . . that the program was the result of racial social engineering rather than a desire to implement a remedy." *Id.* A39. Such justifications for race discrimination have been rejected by this Court, and consequently the circuit court

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[4] The Department of Justice, as an amicus supporting petitioners, implies that this Court's racial classification jurisprudence should be compartmentalized, and that precedents such as *Croson* and *Adarand* do not apply to higher education. Brief For The United States As Amicus Curiae Supporting Petitioners ("DOJ Br.") 13-14. That implication is directly contrary to this Court's emphasis in *Adarand* on the unitary nature of its racial classification jurisprudence, and the Court's emphasis on *Croson* as an integral part of that jurisprudence. *See, e.g., Adarand*, 115 S. Ct. at 2106-11 (tracing the consistency of the Court's race classification decisions from *Hirabayashi v. United States*, 320 U.S. 81 (1943), "through *Croson*"). Indeed, the attempt by the Justice Department to limit *Croson* is inconsistent with the Court's reliance in *Croson* itself on an example drawn from higher education. *Croson*, 488 U.S. at 499.

concluded that petitioners had failed to show a compelling interest in remedying the present effects of past discrimination sufficient to maintain the use of race in their admission system. *Id.* A47. In light of this conclusion, the court did not need to consider whether petitioners' program was "narrowly tailored" to serve a compelling remedial interest, but noted that petitioners' 5% and 10% "targets" "are more reflective of a goal of diversity . . . than of a goal of remedying past discrimination." *Id.* A47 & n.50; *see also* A70-A72 (Wiener, J., concurring) (concluding that petitioners' program was not "narrowly tailored").

With respect to petitioners' "new [eve-of-trial] procedure," the court of appeals found that there was nothing in the record to indicate that the "new procedure" would "cure the additional constitutional defects" identified by the court. "Most significantly, there is no indication that in employing the new plan, the law school will cease to consider race *per se* in making its admissions decisions. To the contrary, as the district court recognized, the law school continues to assert that overt racial preferences are necessary to the attainment of its goals." *Id.* A54.

The court also held that the district court had improperly imposed on respondents the burden of showing how petitioners' admissions system would have operated if it had been free of a racial taint, and that the district court had also erred in its analysis of the availability of compensatory damages. *Id.* A51-A53. The court declined to award punitive damages, and declined to issue an injunction. *Id.* A55. The court remanded for further proceedings. *Id.* A62.

Petitioners did not seek rehearing of the court of appeals' decision.

C. Petitioners' "New Course" For Admissions

On the day the petition was filed, the Attorney General for petitioner State of Texas announced a "new course" for admissions at the University of Texas School of Law, one in

which admissions decisions will no longer "be based upon race or ethnicity," and in which race will play "no determinative role." There will instead apparently be a system in which there will be only one standard for all applicants, regardless of race. This "new course" does not appear to involve the 5% and 10% racial targets previously pursued by petitioners. Somewhat confusingly, however, the Attorney General announced that race and ethnicity *will* be considered in some unspecified way as part of "determining individual merit."[5]

The petition appears to articulate yet a third "new policy," Pet. 4, one in which "[e]ach candidate is given fully individualized treatment on his or her own merits," *id.* 5, but race remains an essential factor, the percentage targets remain in place and "diversity" remains an essential justification for the scheme. *Id.* 29. Significantly, petitioners do not cite any record support for this description of their "new policy," and concede that "the record contains far too little information about the current admissions policy." *Id.*

REASONS FOR DENYING THE WRIT

Petitioners urge no fewer than six separate "questions presented," each of which they maintain requires the Court to exercise its certiorari jurisdiction. This case does not, however, satisfy the Court's criteria for certiorari review.

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[5] Equating race with merit would appear to be the essence of racism. Indeed, not even Justice Powell's *Bakke* opinion goes anywhere near that far. Moreover, considering race as one of a "multitude of personal factors" in an individual case is either irrelevant or determinative. If race is to play "no determinative role," then there is no point to considering race at all.

A. The Decision Below Does Not "Overrule" *Bakke*

Petitioners first assert that "the court of appeals took it upon itself to overrule, anticipatorily, the holding of a five-Justice majority" in *Bakke*. Pet. 1. Petitioners mischaracterize both *Bakke* and the court of appeals' decision.

Petitioners urge that the court of appeals "ignored" the "holding" of *Bakke* set forth in Part V-C of the *Bakke* decision, a single paragraph of the decision and the only paragraph (other than the factual statement) that commanded the votes of five Justices. Pet. 12. Part V-C provides in its entirety:

> In enjoining petitioner from *ever* considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from *any* consideration of the race of any applicant must be reversed.

Bakke, 438 U.S. at 320 (emphases added). Petitioners do not attempt to explain how the decision below is inconsistent with Part V-C and, indeed, there is no inconsistency.

Part V-C simply provides that the Constitution does not preclude consideration of race in *all* circumstances, and thus under some circumstances a State may consider race in admissions as part of a "properly devised admissions program." The court below agreed, recognizing that a State may take race into consideration as part of a narrowly tailored program to remedy the present effects of historical discrimination. *E.g.*, Pet. App. A16, A33. The court therefore did not forbid the consideration of race in all

circumstances, and thus is not "in flat violation" of *Bakke*. Pet. 12. The court's holding that *petitioners* could not use race in admissions simply reflects the court's conclusion, amply supported by the record, that under this Court's precedents, petitioners' race-driven admissions program was not narrowly tailored to remedy the present effects of past discrimination. But the decision plainly does not conflict with what petitioners characterize as the "holding" of *Bakke*. The similar statement by the Justice Department that the court below "recognized" that its decision was inconsistent with *Bakke's* "holding," made without citation to the court's opinion, is also incorrect. DOJ Br. 9.

For the same reason, the court of appeals did not "overrule" *Bakke*, because the *Bakke* precedent, even in petitioners' view, is contained *only* in Part V-C. The court below separately considered whether the bulk of Justice Powell's lone opinion in *Bakke* that was *not* part of the Court's decision -- his discussion of "diversity" -- was binding precedent, and concluded that it was not. As the court below accurately observed, "Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case." Pet. App. A23. There is nothing either wrong or surprising in the court's straightforward analysis and application of *Bakke*.[6] Petitioners' attempt to suggest otherwise is contradicted by the care the court gave to its analysis and by the *Bakke* decision itself.[7]

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[6] The circuit court's painstaking analysis of Justice Powell's *Bakke* opinion is also fully consistent with this Court's recent instructions as to how such "fifth vote" concurring opinions are to be interpreted. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1127-28 (1996); *Rutledge v. United States*, 116 S. Ct. 1241, 1246, 1249 (1996).

[7] Petitioners accuse the court of appeals of relying in its discussion of *Bakke* on "concurring and dissenting opinions

[Footnote continued on next page]

Petitioners' final *Bakke* argument is that "[w]hatever the status of *Bakke*, the issue should be decided by this Court, so that the same rule applies across the country." Pet. 15. By the "status of *Bakke*" petitioners clearly do not mean to suggest that there is any confusion about Part V-C; rather, they are concerned with the fate of Justice Powell's extensive *dicta* about "diversity."[8]

Petitioners do not pretend that there is any conflict among the circuits on this issue. To the contrary, the only other recent circuit decision involving the use of racial preferences in higher education was relied upon by the court of appeals below, and the two decisions are fully consistent. *Cf. Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (holding a race-exclusive scholarship to be unconstitutional), *cert. denied*, 115 S. Ct. 2001 (1995); *see also* Pet. App. A41-A43.

[Footnote continued from previous page]

by the members of this Court," but immediately acknowledge, in a footnote, that the court based its *Bakke* analysis on "five citations to Supreme Court majority opinions," as well as other authorities. Pet. 13 & n.7. Petitioners' point in counting citations is obscure, but in any event they contradict themselves.

[8] The Justice Department goes far beyond Justice Powell's *Bakke* opinion, stating that the law school has a compelling interest in "a *racially* diverse student body." DOJ Br. 16 (emphasis in original). For Justice Powell, "diversity" was not merely a code word for "proportional race representation" or "racial balance." *See Bakke*, 438 U.S. at 307 (opinion of Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."); *id.* at 315 (an admissions program focused solely on race "would hinder rather than further attainment of genuine diversity"). *See also Croson*, 488 U.S. at 507 ("racial balancing" an impermissible goal).

The circuit court system and this Court's certiorari practice presume that at various points in time different "rules" will obtain in the different circuits as the law develops; indeed, allowing such different "rules" to emerge is a primary element in this Court's historical exercise of its certiorari power. Respondents believe that this Court's decisions make clear the "status of *Bakke*" -- and also make clear the separate issue of the status of Justice Powell's solitary *dicta* in *Bakke* -- so that the same rule *already* applies across the country.[9] There is no basis for presuming, so shortly after the court of appeals' decision, that any "circuit split" will develop, particularly in light of the guidance that the Court gave on the issue of racial classifications in its very recent decision in *Adarand*. Should such a division of authority ever arise, this Court can resolve any such differences at that time.

In any event, the legitimacy *vel non* of petitioners' strained *Bakke* argument is not worthy of certiorari in the context of *this* case. As Judge Wiener's concurrence makes plain, even if petitioners' expansive interpretation of Justice Powell's *Bakke* opinion has somehow become the law of the land, petitioners' program must still be held to violate the Constitution, because it is not "narrowly tailored" to accomplish even an interest in "diversity." Pet. App. A70-A72. Thus the issue at the heart of the petition -- the legal

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[9] Other cases have rejected Justice Powell's *Bakke dicta* in light of this Court's teachings in *Croson*. *E.g.*, *Podberesky v. Kirwan*, 956 F.2d 52, 55 (4th Cir. 1992) ("Because of the danger of stigmatic harm, classifications based on race, understandably, must be reserved for remedial settings.") (citing *Croson*); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir.) ("The whole point of *Croson* is that disadvantage, diversity, or other grounds for favoring minorities will not justify governmental racial discrimination . . . only a purpose of remedying discrimination against minorities will do so."), *cert. denied*, 500 U.S. 954 (1991).

significance of Justice Powell's sentiments about "diversity" in *Bakke* -- is not squarely presented by this case. The Court should not grant certiorari review merely to affirm on the unremarkable ground that, assuming without deciding that "diversity" is a compelling interest, petitioners' admissions program does not satisfy "narrow tailoring."

B. The Court Of Appeals Correctly Applied This Court's Precedents To Petitioners' Purported "Remedial" Justification

Petitioners' second "question presented" appears to be a plea that petitioners be authorized to consider societal discrimination in order to justify their use of race in admissions. *Compare* Pet. i with 16-20. Significantly, even Justice Powell's *Bakke* opinion, which petitioners otherwise embrace, rejected such a proffered justification for racial discrimination. *Bakke*, 438 U.S. at 307-08. The Court has repeatedly reached the same conclusion. *Croson*, 488 U.S. at 498-99; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 268 (1986) (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for finding race-conscious state action and for imposing a racially classified remedy."); *see also Adarand*, 115 S. Ct. at 2109-10 (endorsing *Croson's* approach to the "analysis for remedial race-based governmental action").[10]

Petitioners imply that their admissions program was adopted at the long-ago command of the federal Office of Civil Rights ("OCR") in the Department of Education. Pet. 8-9, 18. It was not, as both lower courts found. *E.g.*, Pet. App. A46 (race-based admission program was "self-initiated"

[10]Petitioners try to manufacture a "circuit split" on this issue by citing two cases decided before *Adarand* and *Croson*. Pet. 18. In those latter two cases, this Court provided extensive guidance on this issue, and petitioners do not identify any *current* circuit split.

and there is "no indication" that OCR "imposed a direct obligation upon the law school"); *id.* B36 (OCR "has not, however, required the State to adopt any specific procedures"). In any event, OCR could not require petitioners to adopt a program in violation of the Constitution. *Id.* A45.[11]

Petitioners also seek to justify the law school's admissions program by reference to discrimination by the State in primary and secondary schools. Pet. 16-17. This Court, however, has required that race preferences be designed to remedy discrimination "by the governmental unit involved." *Wygant*, 476 U.S. at 274 (plurality opinion); *see also Croson*, 488 U.S. at 499 (rejecting professional school preference based on "discrimination in primary and secondary schooling").[12] Other than the discrimination they practiced in

[11]Petitioners offer a misleading quotation from *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994), to support the proposition that Texas' "long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute," *id.* at 866. Pet. 8. The court in *LULAC* specifically limited that statement by the phrase -- omitted by petitioners -- that such history was not in dispute "among the parties" to that case. 999 F.2d at 866. In any case, petitioners never explain how discrimination against *Hispanics* justifies a preference for *Mexican Americans*, to the exclusion of, for example, Honduran Americans or Cuban Americans, and other Hispanic Americans.

[12]The Justice Department suggests that the law school's reliance on discrimination in public schooling is factually distinguishable from the Court's clear statement in *Croson* prohibiting such reliance. DOJ Br. 19 n.17. The Court in *Croson*, however, invoked discrimination in primary education as a classic example of societal discrimination that could not be taken into account by a professional school to support a racial preference. 488 U.S. at 499; *see also Wygant*, 476 U.S. at 268 (plurality opinion).

favor of preferred minorities and against non-preferred groups, petitioners have never identified any discrimination by the law school in admissions in the last forty years, and cannot invoke the conduct of *other* state actors, because the law school operates completely autonomously in admissions.[13]

C. The Decision Below Is Consistent With This Court's Decision In *United States v. Fordice*

Somewhat inconsistently with their arguments about "diversity," petitioners claim that "[t]his is not just an affirmative action case; it is a desegregation case." Pet. 20. Citing *United States v. Fordice*, 505 U.S. 717 (1992),

[13] *E.g.*, Pet. App. A39 (law school "operates as a functionally separate unit within the system" and "maintains its own separate admissions program"). Petitioner Dean Yudof submitted a sworn statement to the district court that "[t]he actual mechanics of [the law school's] admissions policies, including its goals of minority recruitment and diversity in the incoming class, are the province of the admissions committee and myself exclusively. There are no directives, instructions, orders or any other form of commands from the State, the Board of Regents, or the University as a whole that govern the admissions process." Defs. Trial Ex. 447, S.J. Mot. App. A58.

Similarly, petitioners' suggestion that the law school remains linked to *de jure* race discrimination is contradicted by the record and their own concessions. *See* Pet. App. A40 n.44 ("As the defendants concede and the district court found, there is no recent history of overt sanctioned discrimination at the University of Texas."); *id.* A48 n.50 ("There is no history either of *de jure* discrimination against Mexican Americans in education at any level in Texas or of *de facto* discrimination against Mexican Americans by the law school."). Indeed, as noted above, petitioners have discriminated *in favor* of selected minorities in admissions for more than a quarter century.

petitioners attempt to invoke their "broad affirmative duty . . . to dismantle" officially segregated systems of higher education to justify their use of a racially discriminatory admissions process at the law school. Pet. 20.

Petitioners' argument is not even a plausible construction of *Fordice*. *Fordice* described the obligations under the Fourteenth Amendment of a State that had formerly operated a dual system of higher education. The Court held that those policies traceable to the *de jure* era of segregation had to be "reformed to the extent practicable and consistent with sound educational practices." *Fordice*, 505 U.S. at 729. Thus, to fall within *Fordice*, petitioners must start by identifying a law school admissions policy traceable to the *de jure* era. Not only have they repeatedly failed to do so (and fail to do so again in the petition), but it is abundantly clear that the admissions policies at the law school are *not* traceable to the *de jure* era. Petitioner Johanson, the long-time chair of the law school's admissions committee, testified that in the 1960s the law school had "virtually open enrollment." Trial Tr., Vol. 3 at 12; *see also id.* at 13 ("if you were breathing, then you were admitted to the UT Law School"). Further, as noted above, as early as the 1960s petitioners had adopted admissions practices that granted preferences to minorities. There is thus a clean and undeniable break with the admissions policies of the *de jure* era. And, of course, there was never any *de jure* discrimination against Mexican Americans. Pet. App. A48 n.50.

Petitioners assert that "[t]he evidence was undisputed that if Texas is compelled to abandon any consideration of race at its state law schools, it will return to a starkly dual system of legal education." Pet. 21. In fact, there was *no* such evidence in the record. Rather, petitioners presented evidence that under an imaginary regime, in which they were *compelled to rely strictly upon test scores alone*, very few minorities would qualify. But respondents have never urged that petitioners use only test scores, and petitioners are

certainly not legally obligated to do so. Petitioners will presumably *never* adopt a purely numerical scheme, given their recognition of the limitations of GPA and LSAT scores, Pet. 11, and they remain free to admit students of all races including those who have relatively low test scores. Petitioners also remain free to attract students of all races by a variety of incentives and programs, so long as they comply with the Constitution and applicable statutes. Their "undisputed evidence" is nothing more than rhetorical hyperbole, wholly irrelevant to this lawsuit. For precisely the same reasons, petitioners' assertion that "the effective resegregation" of the law school was "[n]ot contested below," Pet. 1, is entirely incorrect.

Petitioners urge that they have a "constitutional duty . . . to eliminate, or to counteract and minimize to the extent possible, strict reliance on test scores that effectively segregate white and minority students." Pet. 21. *Fordice* imposes no such duty, because, as shown above, "strict reliance on test scores" is not a policy traceable to the *de jure* era. But even assuming petitioners do have such a duty, they do not explain why they cannot simply "eliminate . . . strict reliance on test scores," without taking race into account. Indeed, petitioners may eliminate all reliance on test scores if they so choose. Certainly nothing in the decision below prevents them from doing so.

The invocation by petitioners and the Justice Department of the specter of "resegregation" is both false and offensive, because it is based upon the implicit premise that minorities cannot compete in a color-blind system that does not contain "special" preferences designed to benefit them alone. The "resegregation" argument is also wholly at odds with petitioners' repeated insistence that race is only a modest factor in admissions, only "one of many factors" to be considered. *Id.* 29. If the use of race is truly so minimal, then *prohibiting* petitioners' use of race should not have a

substantial impact on admissions. Petitioners cannot have it both ways.

Fordice cannot be transformed into a warrant to adopt new policies that have no relationship to desegregation and that themselves discriminate on the basis of race. The decision below is entirely consistent with *Fordice*, and review is therefore not warranted.

D. *Seminole Tribe* Does Not Insulate Petitioners From Damages Under Title VI

Petitioners assert that under *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), the Eleventh Amendment bars claims against the States under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1994). But as the Justice Department recognizes, this Court's decision in *Seminole Tribe* neither transforms Title VI jurisprudence, nor invalidates the decision below. *See* DOJ Br. 10 n.8 (Texas has no sovereign immunity from suits under Title VI).

Seminole Tribe clarified that Congress can abrogate States' Eleventh Amendment immunity to suit provided that it manifests a clear intent to do so, and acts "pursuant to a valid exercise of power." 116 S. Ct. at 1123-24. Title VI, as amended, provides explicitly that a "State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of . . . Title VI of the Civil Rights Act of 1964 . . . ." 42 U.S.C. § 2000d-7(a)(1) (1994). Petitioners contend that such abrogation of Eleventh Amendment immunity was not "pursuant to a valid exercise of power."[14]

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[14]At the time of petitioners' Eleventh Amendment motion in the district court, the law school and the University of Texas were not named as defendants, and petitioners have not previously in this litigation raised any Eleventh Amendment defense on their behalf. Thus, whether the law school is entitled to Eleventh Amendment immunity as an

[Footnote continued on next page]

There can be no doubt of Congress' power under the Fourteenth Amendment to abrogate a state's Eleventh Amendment immunity from suit. *Seminole Tribe*, 116 S. Ct. at 1125, 1131 n.15. *Accord Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("Congress may . . . for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials"). Nor is there any doubt that this Court, prior to *Seminole Tribe*, held that Congress *had* abrogated States' immunity when it amended Title VI in 1986. *Franklin v. Gwinnett County Public Schs.*, 503 U.S. 60, 72 (1992) (in the 1986 amendments, "Congress abrogated the States' Eleventh Amendment immunity under . . . Title VI"). *See also id.* at 78 (Scalia, J., joined by Rehnquist, C.J. and Thomas, J., concurring in the judgment) (noting that the 1986 amendment "withdr[ew] the States' Eleventh Amendment immunity"). Nothing in Chief Justice Rehnquist's opinion for the Court in *Seminole Tribe*, in which Justices Scalia and Thomas joined, indicates that the Court in that case meant to overrule *Franklin*.

Moreover, the statute at issue in *Seminole Tribe* could have been enacted *only* under Congress' Article I powers. Title VI's abrogation of Eleventh Amendment immunity, however, could be based on Congress' power under either or both Article I and Section 5 of the Fourteenth Amendment. This

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[Footnote continued from previous page]

arm of the State was not addressed by the courts below. Given the unusual nature of the Eleventh Amendment defense, and its intricate dependence on questions of state law, this Court has indicated that as a prudential matter it may choose not to address an Eleventh Amendment argument on such a scant record. *E.g., Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 515 n.19 (1982).

Court has previously rejected arguments that Congress must specifically invoke its Section 5 powers. *E.g., EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (in exercising its authority under Section 5, Congress need not state that it is relying upon that power). In reviewing legislation, the courts need only "be able to discern some legislative purpose or factual predicate that supports the exercise of that [Section 5] power." *Id.* Indeed, this Court previously relied on Section 5 to uphold another statute regulating practices of recipients of federal funds, where authority under Article I may have been limited. *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (plurality opinion) (upholding statute under Section 5 even though Congress made no statements regarding use of that power because "Congress *could have* achieved its objectives by use of its power under § 5 of the Fourteenth Amendment") (emphasis added). Similarly, in this case, Congress clearly could have achieved its objectives under Title VI by use of its power under Section 5, and nothing in *Seminole Tribe* affects that analysis. This Court should avoid a strained construction of Title VI that will unnecessarily render the statute unconstitutional and injure all civil rights plaintiffs. *E.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("every reasonable construction must be resorted to, in order to save a statute from unconstitutionality") (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

Petitioners' assertion that Title VI was enacted and amended "solely" as an exercise of Congress' Spending Power depends largely on cases decided *before* the relevant 1986 amendment, and, in any event, is simply wrong. There is ample evidence, if evidence is needed, that Congress thought

it was drawing upon *both* sources of power in enacting and amending Title VI.[15]

Even if Title VI is *solely* a Spending Clause statute, petitioners' immunity claim must fail. This Court has held that states may waive their Eleventh Amendment immunity by accepting funds pursuant to a Spending Clause statute, if the statute explicitly provides that accepting such funds will bar or waive an immunity claim. Petitioners have chosen to receive federal funds in the face of the statute's explicit provision that the States that do so may not invoke Eleventh Amendment immunity. Petitioners' argument that the amended Title VI is not clear on this point, Pet. 24 n.17, is incredible in light of the statutory text. *See also* 132 Cong. Rec. 28,624 (1986) (1986 amendments to Title VI clarify that States' "receipt of Federal funds constitutes a waiver" of Eleventh Amendment immunity).

E. The Court Of Appeals Followed This Court's Precedents In Allocating The Burden Of Proof

Petitioners' argument with respect to the court of appeals' allocation of the burden of proof does not involve a question of law. Rather, it is predicated upon a disagreement about a finding of fact, which disagreement does not constitute a question worthy of certiorari review. Moreover, the court of

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[15]*See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 686 n.7 (1979) (quoting legislative history that 1976 amendments to Title VI are based on "Congress' obligation to enforce the 14th amendment"); *Bakke*, 438 U.S. at 330-33 (opinion of Brennan, White, Marshall and Blackmun, JJ.) (citing legislative history to demonstrate that Title VI was predicated on the Fifth and Fourteenth Amendments); *id.* at 416 (opinion of Stevens, J.) (same); S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986) (1986 amendments adopted pursuant to Section 5 of the Fourteenth Amendment).

appeals' decision is fully consistent with this Court's precedents.

Petitioners state, correctly, that in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977), this Court held that "once a plaintiff proves that an impermissible consideration was a 'substantial factor' in causing the plaintiff concrete injury (such as the loss of a job), the burden then shifts to the defendant to show that it would have reached the same decision in the absence of the constitutional violation." Pet. 26 (citing *Mt. Healthy*, 429 U.S. at 287). Petitioners argue that the law school's reliance on race was not a "substantial factor" in respondent's rejection. *Id.* That is an extraordinary assertion because the record demonstrates that respondents would have been admitted to the law school *if they had belonged to one of the preferred racial groups.* When the "impermissible consideration" is determinative, it is plainly a "substantial factor." But in any event, petitioners present only a factual dispute, not a dispute about the correct legal standard.[16]

Petitioners also mischaracterize the court of appeals' opinion by arguing that the court "has in effect *presumed* that

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[16]Petitioners urge that 151 nonminority residents with TI scores lower than respondents' scores were offered admission. Pet. 26. The same point, of course, could be made about the *Bakke* case, in which the average nonminority applicant granted admission had scores significantly lower than Allan Bakke's scores. *Bakke*, 438 U.S. at 277 n.7. Petitioners emphasize this statistic to suggest that respondents' admission would not have been assured under a race-neutral system. Respondents have never argued to the contrary. Respondents contend only that under this Court's precedents, because petitioners engaged in impermissible racial discrimination in their admissions program, petitioners have the burden to *prove* that respondents would *not* have been admitted under a race-neutral system.

respondents are entitled to admission simply because the Law School considered race in its admissions decisions." Pet. 27. If petitioners mean to suggest that the court of appeals created a *conclusive* presumption, they plainly are mistaken: on remand, petitioners will have the opportunity to demonstrate "that a plaintiff would not have gained admittance to the law school under a race blind system," and if they do so, "that plaintiff would not be entitled to an injunction admitting him to the school." Pet. App. A51. There is thus no conclusive presumption involved at all; and any objection to a rebuttable presumption is simply wrong. Under *Mt. Healthy* (and the decision below), if petitioners -- who crafted the admissions process -- fail to carry their burden, respondents are entitled to an order of admission or other equivalent remedy. *See* Pet. App. A51-A52. Such burden shifting is not in tension with *Carey v. Piphus*, 435 U.S. 247 (1978), the case on which petitioners rely. In *Carey*, this Court -- consistent with its decisions in *Mt. Healthy* and *Villiage of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) -- required school officials, who had suspended students in violation of their due process rights, to prove on remand that the students "would have been suspended even if a proper hearing had been held," and if the officials could do so, *then* the students would not be entitled to damages. *Carey*, 435 U.S. at 260. *See also Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (adopting the same burden shifting mechanism for Title VII cases); *id.* at 269 (O'Connor, J., concurring) (noting lower courts' use of same burden shifting mechanism in Equal Protection Clause cases).

Petitioners further urge that as a result of the operation of the *Mt. Healthy* rule, respondents are placed "in a better position than they would have occupied" had the law school chosen not to discriminate in the first place. Pet. 27. That argument ignores, for example, the fact that respondent Cheryl Hopwood's legal career has been delayed by at least

five years. Petitioners also complain that they are now exposed to suit by all those against whom they have discriminated. *Id.* All discriminators could, and generally do, make the same complaints. Petitioners -- proven and self-confessed discriminators -- surely should not be permitted to invoke the *duration, scale and effectiveness* of their own misconduct in order to limit respondents' relief. The record shows that petitioners willfully chose to discriminate, and petitioners' exposure to suit is entirely of their own making. Ensuring that appropriate remedies are available in these circumstances is intended to deter would-be discriminators across the board. The burden cannot be on the victims of discrimination to show "what would have happened" under a constitutional program when the admissions program is entirely under petitioners' control. Moreover, the particular amount of petitioners' exposure to damages from victims of their racial discrimination does not constitute a question worthy of certiorari review.

F. Federal Courts May Decide Cases Without Violating Article III

Petitioners' last ground for seeking certiorari is predicated on another obvious mischaracterization of the court of appeals' decision, and indeed of the judicial process.

Petitioners assert that the court of appeals awarded "prospective relief" in the form of "thinly-veiled judicial directives," and that "such intrusive equitable relief" is both unjustified on the record here and contrary to Article III's "case" or "controversy" requirement. Pet. 28-29.

The first, and dispositive, answer to this singularly confused argument is that the court of appeals did not award any "prospective relief." Although respondents *asked* the court to enter prospective injunctive relief, the court specifically *declined* to do so. *E.g.*, Pet. App. A55 ("we leave intact [the district] court's refusal to enter an injunction"). No injunction

will issue without further proceedings before the district court. *Id.*

Second, *Adarand* is instructive on this issue. In that case, Adarand Constructors, Inc. sought to enjoin *future* use of racial classifications in a contracting program. The Court held that the company had standing to seek prospective injunctive relief because the record contained evidence that it was likely to bid again and thus be subject to the contracting program. *Adarand*, 115 S. Ct. at 2104-05. In order to avoid the teaching of *Adarand*, petitioners assert -- baldly and incorrectly -- that "the record is barren of support for the speculation that plaintiffs will reapply" to the law school. Pet. 28. In fact, the record is very explicit on that point: the district court found (in an opinion cited by petitioners but not included in their appendix) that "there exists a reasonable likelihood Plaintiffs will, if not granted admission in this lawsuit, want to reapply to the Law School . . . ." October 28, 1993 Memorandum Opinion and Order at 10, cited at Pet. 3. Similarly, respondent Hopwood testified that she was ready, willing and able to attend the law school if the Court issued an order that permitted her to do so without having to subject herself to a racially discriminatory admissions process. *E.g.*, Trial Tr., Vol. 8 at 10.

Third, petitioners argue that the record simply does not contain enough information about their current admissions policy. Pet. 28-29. That is indeed correct, but it is a compelling reason why this Court should not grant certiorari in order to pass on an amorphous, unverified "plan" that petitioners themselves continue to describe in contradictory terms. What the record does contain is ample support for the court of appeals' conclusions that petitioners had failed to justify under strict scrutiny their use of race in admissions, and that petitioners' unconstitutional discrimination must stop.

Petitioners' argument is actually a challenge to judicial review. The court of appeals clearly stated the law, and clearly expects petitioners to abide by its decision. Petitioners of course are not now free to revert to the use of race to discriminate in admissions, unless they can meet the requirements of strict scrutiny. But similar consequences flow *whenever* a court elucidates the commands of the Constitution, as actors are required to change their conduct to conform to the law as pronounced by the judicial system. It simply is not the case that such prospective *effects* of judicial decisions amount to *injunctions* (particularly when the deciding court specifically says it is not issuing an injunction). Similarly, that a judicial decision might cause individuals to change their conduct in order to conform to the law does not mean the decision was issued in violation of Article III.

Even if petitioners' characterization of the decision below as an "injunction" were correct, the decision would clearly be proper. Petitioners repeatedly insisted in the courts below that they intended to continue to discriminate in admissions, and there is a specific finding "that it is likely that the law school will continue to take race into account in admissions unless it receives further judicial instruction," Pet. App. A54-A55. This Court has long recognized that changes in conduct induced by pending litigation do not insulate defendants from prospective injunctions, and petitioners have repeatedly conceded that all changes to their admissions process were driven by this litigation. *See, e.g., id.* A13 n.15 (law school changed its procedure as a result of this suit). The courts' "power to grant injunctive relief survives the discontinuance of the illegal conduct." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). In *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974), the Court stated that "a unilateral change in the *admissions procedures* of the Law School" does not deprive the Court of authority to issue appropriate relief if (as here) the plaintiff may reapply. (Emphasis in original).

As the court below stated in another discrimination case, "reform timed to anticipate or blunt the force of a lawsuit offer[s] insufficient assurance that the practice sought to be enjoined will not be repeated." *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 354-55 (5th Cir. 1977) (Wisdom, J.) (ordering prospective injunctive relief against discriminatory employment policies), *cert. denied*, 434 U.S. 1034 (1978). It makes no sense -- for the parties or for the judicial system -- to require the same issues to be relitigated every time a discriminator makes some modest or cosmetic change to its race-based policies. Indeed, given the inevitable delays and costs associated with bringing suit, such a rule could well mean that state actors could escape meaningful judicial review of their racially discriminatory activities. Civil rights plaintiffs in respondents' position should not be required to bring suit repeatedly to remedy massive resistance by confessed discriminators.

CONCLUSION

The petition for a writ of certiorari should be denied.

May 30, 1996.

Respectfully submitted,

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